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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 TRACEY R.,

9 Plaintiff,

10 v.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

Case No. C18-5966 RAJ

**ORDER AFFIRMING THE
COMMISSIONER'S DECISION
AND DISMISSING THE CASE
WITH PREJUDICE**

13 Plaintiff seeks review of the denial of his application for Supplemental Security Income
14 (SSI). Plaintiff contends the ALJ erred by rejecting his testimony, a lay witness' testimony, and
15 three medical opinions, and by accepting two other medical opinions. Dkt. 12. As discussed
16 below, the Court **AFFIRMS** the Commissioner's final decision and **DISMISSES** the case with
17 prejudice.

18 **I. BACKGROUND**

19 Plaintiff is currently 41 years old, has a high school education, and had no past relevant
20 work before applying for SSI. Dkt. 8, Admin. Record (AR) 1379. After multiple ALJ decisions
21 and district court remands, the ALJ issued a decision in July 2018 finding Plaintiff not disabled.
22 AR 1362-81. The ALJ considered the period from the June 2008 application date through
23

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1 December 2015 because in January 2016 Plaintiff began substantial gainful work, which is
2 inconsistent with disability benefits. AR 1365-66.

3 Utilizing the disability evaluation process outlined in 20 C.F.R. § 416.920, the ALJ found
4 that Plaintiff worked from 2011 through 2015, but that his earnings remained just below the level
5 of substantial gainful activity. AR 1365. During the relevant period from June 2008 through
6 December 2015, Plaintiff had the severe impairments of seizure disorder, lumbar spine
7 degenerative disc disease and degenerative joint disease with right radiculopathy, thoracic spine
8 congenital fusion of T9 and T10, attention deficit hyperactivity disorder (ADHD), bipolar
9 disorder, generalized anxiety disorder, and personality disorder. AR 1366. Plaintiff had the
10 residual functional capacity (RFC) to perform light work with additional limits including no
11 commercial driving or exposure to hazards. AR 1368. He could follow short, simple
12 instructions; perform routine, predictable tasks; make simple decisions; handle occasional
13 workplace changes; and have occasional interaction with the general public. *Id.* He could not
14 work in a fast-paced production environment. *Id.* Based on this RFC, the ALJ determined that
15 Plaintiff could perform jobs that exist in significant numbers in the national economy and
16 therefore was not disabled. AR 1380-81.

17 II. DISCUSSION

18 This Court may set aside the Commissioner's denial of Social Security benefits only if
19 the ALJ's decision is based on legal error or not supported by substantial evidence in the record
20 as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017). Each of an ALJ's findings
21 must be supported by substantial evidence. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir.
22 1998). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such
23 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

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1 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
2 Cir. 1989). The ALJ is responsible for evaluating evidence, resolving conflicts in medical
3 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
4 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may
5 neither reweigh the evidence nor substitute its judgment for that of the ALJ. *Thomas v.*
6 *Barnhart*, 278 F.3d 947, 954, 957 (9th Cir. 2002). When the evidence is susceptible to more
7 than one interpretation, the ALJ's interpretation must be upheld if rational. *Burch v. Barnhart*,
8 400 F.3d 676, 680-81 (9th Cir. 2005). This Court "may not reverse an ALJ's decision on
9 account of an error that is harmless." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

10 **A. Plaintiff's Testimony**

11 Where, as here, an ALJ determines a claimant has presented objective medical evidence
12 establishing underlying impairments that could cause the symptoms alleged, and there is no
13 affirmative evidence of malingering, the ALJ can only discount the claimant's testimony as to
14 symptom severity by providing "specific, clear, and convincing" reasons that are supported by
15 substantial evidence. *Trevizo*, 871 F.3d at 678.

16 In 2009 and 2010 Function Reports, Plaintiff stated that his impairments affected his neck
17 and back movement, concentration, and memory. AR 198, 281. He could only lift 10 to 15
18 pounds. AR 286. He could only walk for about 15 to 20 minutes without pain. AR 200, 286.
19 He needed to change positions often. AR 281. In a 2011 hearing, Plaintiff testified that he can
20 only stand or sit for about 20 minutes. AR 62. He got headaches two to three times a week. AR
21 73. Once every week or two, he had times when he could not stop crying. AR 74. At the time
22 of the 2011 hearing, Plaintiff was working 12 to 20 hours per week at a pizza restaurant. AR 69.

23 He testified that he was physically unable to work full time. AR 75. At the time of a 2015
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1 hearing, Plaintiff was working 12 to 15 hours for the same employer and had been made a
2 manager. AR 997. He testified that when he tried to work more, his physical and emotional
3 condition deteriorated. AR 1019. By the time of a 2018 hearing, Plaintiff was working 30 to 34
4 hours per week at a convenience store. AR 1405. He testified that he could not have done that
5 job during the relevant period, because of “stabilizing after seizures,” being on “heavy
6 medications,” and “panic attacks.” AR 1412.

7 The ALJ discounted Plaintiff’s testimony based on conflict with his activities,
8 inconsistent statements, and lack of corroborating medical evidence. AR 1370-76. An ALJ may
9 discount a claimant’s testimony based on daily activities that either contradict her testimony or
10 that meet the threshold for transferable work skills. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
11 2007). “An ALJ may consider inconsistent statements by a claimant in assessing her
12 credibility.” *Popa v. Berryhill*, 872 F.3d 901, 906–07 (9th Cir. 2017) (citing *Tonapetyan v.*
13 *Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001)). And, “[a]lthough lack of medical evidence cannot
14 form the sole basis for discounting pain testimony, it is a factor that the ALJ can consider in his
15 credibility analysis.” *Burch*, 400 F.3d at 681.

16 In significant part, the ALJ discounted Plaintiff’s allegations of disabling limitations
17 because of his “ability to work during the period at issue” part time at a pizzeria, and to work full
18 time beginning in January 2016 without any major medical change. AR 1375. While Plaintiff
19 testified that he could not have worked more hours at the pizzeria, the ALJ found that he could
20 have worked full time at a job consistent with his RFC.

21 **1. Mental Health**

22 There is no dispute that Plaintiff’s seizures are controlled effectively with medication.
23 See AR 1370-71; Dkt. 14 at 5. Plaintiff argues, however, that the ALJ failed to properly analyze
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1 memory and other cognitive side effects from his seizure medications. Dkt. 12 at 16 (citing AR
2 71-72, 588). The ALJ found that Plaintiff had “moderate” cognitive and memory limitations and
3 incorporated several mental restrictions in the RFC, but discounted Plaintiff’s testimony of more
4 severe limitations based on his activities, including completing college coursework for an
5 associate degree and working part-time as a manager. AR 1367. These activities contradict
6 Plaintiff’s testimony of extreme cognitive and memory limitations, and Plaintiff offers no
7 argument otherwise. Plaintiff challenges the ALJ’s statement that his marijuana use “raises
8 questions” as to whether cognitive issues are due to medication side effects or marijuana use.
9 Dkt. 12 at 16 (quoting AR 1375). Regardless of whether the ALJ’s speculative statement is
10 unfounded, Plaintiff’s activities were a clear and convincing reason to discount his allegations of
11 severe cognitive and memory deficits. Plaintiff fails to show any error in the ALJ’s handling of
12 cognitive and memory impairments.

13 The ALJ also discounted Plaintiff’s allegations of disabling mental health impairments
14 based on lack of support from objective medical evidence. AR 1372. Plaintiff argues that the
15 ALJ “selectively” cited mental health evidence, but fails to identify any contradictory records or
16 demonstrate that the weight of the evidence contradicts the ALJ’s conclusions. Dkt. 12 at 15.

17 Activities, in addition to lack of supporting objective evidence, were sufficient reasons to
18 discount Plaintiff’s mental health testimony.

19 **2. Neck/Back Impairments**

20 The ALJ discounted Plaintiff’s neck and back pain testimony in part because of mild
21 imaging and examination findings. AR 1371.¹ Plaintiff argues that the ALJ is “not a physician

22 ¹ Some evidence the ALJ cited did not support his conclusions. For example, negative x-rays are
23 not informative when the alleged impairments involve soft tissues. *See* AR 1371, 531. And
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1 [and] not qualified” to determine that MRI scans were “‘essentially benign.’” Dkt. 12 at 15
2 (quoting AR 1371). Plaintiff’s argument fails. The ALJ did not make his own medical
3 determination, but relied on the doctors’ own descriptions of the MRI results as “[m]ild” and
4 “negative.” *See* AR 1357. Ironically, in his reply brief Plaintiff cites raw medical data found in
5 a treatment record, such as “positive right SLR and positive crossed left SLR,” and argues that
6 the ALJ erred by “failing to acknowledge” them. Dkt. 14 at 6-7 (citing AR 1651). It is not the
7 ALJ’s role to interpret raw medical data. *See Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir.
8 1975) (An ALJ, “who was not qualified as a medical expert, should not have gone outside the
9 record to medical textbooks for the purpose of making his own exploration and assessment as to
10 claimant’s physical condition.”). Plaintiff also argues that the same treatment record shows that
11 his neurosurgeon opined that his “MRI showed pathology that *might* need to be treated with
12 surgery.” Dkt. 12 at 15 (emphasis added) (citing AR 1651). The neurosurgeon discussed
13 treatment options with Plaintiff, “including the option of surgery,” but did not recommend
14 surgery or opine that surgery was the best option. AR 1651. The treatment record concludes
15 with the decision that Plaintiff will proceed with “conservative measures such as an epidural
16 steroid injection.” AR 1651. This evidence does not “contradict the ALJ’s analysis,” as Plaintiff
17 contends. *See* Dkt. 14 at 7. The doctor, based on his training and expertise, interpreted the raw
18 medical data Plaintiff cites, and concluded that conservative measures were adequate for the time
19 being. This conclusion supports rather than undermines the ALJ’s decision. Plaintiff has shown

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22 normal gait across a doctor’s office does not contradict Plaintiff’s testimony of pain after
23 walking for 20 minutes. *See* AR 1371-72, AR 297. Regardless, the ALJ provided sufficient
other medical evidence, such as MRI results, to support the finding that the objective medical
evidence failed to substantiate Plaintiff’s symptom testimony.

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1 no error. Lack of supporting medical evidence was thus a valid reason supporting the ALJ's
2 discounting of Plaintiff's testimony on neck and back pain.

3 The ALJ also discounted Plaintiff's neck and back pain testimony based on his activities.
4 AR 1374-75. For example, in 2014 Plaintiff reported that he "stands for long periods" at work,
5 contradicting his testimony that he cannot stand for more than 20 minutes. AR 1304. In 2011,
6 Plaintiff "lifted some heavy tables," which only "set him back slightly." AR 1273. This tended
7 to contradict his reported inability to lift more than 10 to 15 pounds. Playing softball and
8 basketball, reported consistently throughout the record, also contradicted his allegations of
9 disabling neck and back pain. *See, e.g.*, AR 708, 772. Plaintiff argues that playing softball and
10 basketball does not contradict his testimony because, on one occasion in 2009, he reported
11 "muscular soreness" after playing basketball and because in 2010 he reported playing softball
12 weekly, sometimes taking a "couple weeks' break" due to pain. Dkt. 14 at 8 (citing AR 664,
13 285). This argument, which borders on frivolous, is not sufficient to overturn the ALJ's rational
14 interpretation of the record. *See Burch*, 400 F.3d at 680-81. The ALJ relied on numerous reports
15 of Plaintiff playing basketball and softball regularly with little to no report of pain. *See, e.g.*, AR
16 667 ("playing basketball 1x per week (40 minutes) without increased symptoms"). Both sports
17 are physically demanding, require extensive use of the neck and back, and can cause muscular
18 soreness even in healthy individuals.

19 Activities, together with lack of supporting objective evidence, were sufficient reasons to
20 discount Plaintiff's testimony on neck and back pain.

21 **3. Inconsistent Statements**

22 The ALJ also discounted Plaintiff's testimony because of evidence that Plaintiff
23 exaggerated his symptoms. AR 1374. During a July 2015 physical therapy evaluation, Plaintiff
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1 demonstrated “pain behaviors during testing [that were] not observed during entry into” the
2 appointment. AR 1344. “Other deviations” were also observed. *Id.* Range of motion was
3 “inconsistent in testing situations,” varying “at least 20-30 degrees.” *Id.* Plaintiff’s only
4 argument is that all the inconsistencies the ALJ cited occurred during this evaluation, and the
5 physical therapist concluded that Plaintiff “had many limitations consistent with his complaints.”
6 Dkt. 12 at 15. Plaintiff’s argument fails. First, the ALJ may rely on evidence of exaggeration
7 even if it only occurs once; there is no caselaw or regulation supporting the proposition that a
8 claimant must be shown to have exaggerated on at least two occasions. Even if there were any
9 support for such a proposition, the ALJ cited other inconsistencies, such as Plaintiff’s functional
10 activity level of 8 out of 10 with medication contradicting his allegations of disabling limitations.
11 *See* AR 1328. Second, the physical therapist’s “Assessment” section only describes—aside from
12 Plaintiff’s self-reported symptoms—decreased range of motion, which “varied during [testing],”
13 and “tenderness to palpation.” AR 1346. This mild assessment does not support Plaintiff’s
14 claims of disabling limitations. Inconsistent statements and evidence of symptom exaggeration
15 was another clear and convincing reason to discount Plaintiff’s testimony.

16 The Court concludes the ALJ did not err by discounting Plaintiff’s testimony.

17 **B. Medical Opinions**

18 In a 2017 order reversing and remanding a 2016 ALJ decision, this court upheld the
19 ALJ’s discounting of several medical opinions that Plaintiff again challenges. AR 1477-92; Dkt.
20 12. The law of the case doctrine, which applies in social security cases, “generally prohibits a
21 court from considering an issue that has already been decided by that same court” unless “the
22 evidence on remand is substantially different, ... the controlling law has changed, or ... applying
23 the doctrine would be unjust.” *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016). Plaintiff

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1 argues that this court’s ruling on the challenged opinions “was both dictum and an improper *post*
2 *hoc* rationale.”² Dkt. 14 at 2. Neither of those characterizations, even if true, would be an
3 exception to the law of the case doctrine. Plaintiff argues that the Appeals Council vacated the
4 2016 ALJ decision on remand but, again, this is not an exception to the law of the case doctrine.
5 *Id.* The issues—challenges to discounting certain medical opinions—have already been decided
6 by this court.

7 Plaintiff also argues that the ALJ erred in light of *Buck v. Berryhill*, which was a “change
8 in the law.” *Id.* (citing 869 F.3d 1040, 1049 (9th Cir. 2017)). *Buck* did not alter the law. Prior
9 Ninth Circuit precedent already established that an ALJ may not reject an examining doctor’s
10 mental health opinions based on the doctor’s reliance on a claimant’s self-reports when the
11 doctor’s opinions are supported by objective measures, such as observations from a mental status
12 examination, and the doctor does not question the patient’s credibility. *See Ryan v.*
13 *Commissioner of Soc. Sec.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008); *see also Edlund v.*
14 *Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001); *Regennitter v. Comm’r Soc. Sec. Admin.*, 166
15 F.3d 1294, 1300 (9th Cir. 1999).

16 Finally, Plaintiff argues that the ALJ’s failure to address “moderate” limitations in the
17 challenged opinions was not addressed by this court. Dkt. 14 at 3. But Plaintiff fails to make
18 any argument whatsoever that the opined moderate limitations would require any additional
19 limitations in the RFC. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (“[T]he burden of
20 showing that an error is harmful normally falls upon the party attacking the agency’s
21 determination.”); *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir.

22 ² Plaintiff’s counsel is advised to review the difference between a *post hoc* rationale and
23 harmless error analysis.

2008) (declining to address issues not argued with specificity in briefing); *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003) (party must argue an issue “specifically and distinctly” to invoke this court’s review). Plaintiff has shown no error.

The law of the case doctrine precludes Plaintiff’s challenges to the ALJ’s discounting of the April 2008, May 2009, and November 2010 opinions of Terilee Wingate, Ph.D., and the May 2010 opinion of Bill Wilson; and to the ALJ’s acceptance of the state agency non-examining doctors’ opinions. *See* AR 1482-83, 1487-88, 1486-87. The only remaining medical opinions that Plaintiff contends the ALJ erred by rejecting are those of Tasmyn Bowes, Psy.D.

1. Dr. Bowes

An ALJ may only reject the contradicted opinion of an examining doctor by giving “specific and legitimate” reasons. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017).

In April 2010 and October 2011, examining psychologist Dr. Bowes filled out Psychological/Psychiatric Evaluation forms. AR 772-79, 947-52. In 2010, Dr. Bowes opined only mild to moderate limitations in work-related functions, and the ALJ accepted those opinions. AR 777, 1377. In 2011, Dr. Bowes opined mostly mild to moderate limitations, which the ALJ again accepted, but opined that Plaintiff had marked limitations in the abilities to take appropriate precautions for normal hazards, communicate and perform effectively in a job with public contact, and maintain appropriate behavior at work. AR 951, 1377. The ALJ rejected the marked limitations as inconsistent with Plaintiff’s activities and contradicted by the lack of clinical abnormalities in Dr. Bowes’ examination. AR 1377. The ALJ also stated that “the opinion does not specifically describe the claimant’s level of functioning as terms such as ‘moderate’ and ‘marked’ are vague and not in vocational terms.” AR 1377. This statement

makes little sense, because Dr. Bowes filled out standardized forms commonly used in social

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1 security determinations, with terms such as “moderate” and “marked” provided on the form. The
2 same terms were used in the check-box forms filled out by state agency doctors whose opinions
3 the ALJ accepted. *See, e.g.*, AR 721-22, 1377. However, because the ALJ provided specific and
4 legitimate reasons to reject Dr. Bowes’ opined marked limitations, any error is harmless. *See*
5 *Molina*, 674 F.3d at 1117 (error harmless if “inconsequential to the ultimate disability
6 determination”)

7 **a. Activities**

8 Conflict with a claimant’s activities is a specific and legitimate reason to reject a doctor’s
9 opinion. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014); *see also Valentine v. Comm’r*
10 *Soc. Sec. Admin.*, 574 F.3d 685, 692-93 (9th Cir. 2009) (inconsistency with the claimant’s actual
11 work activity is a proper reason to reject a medical opinion). The ALJ cited activities such as
12 completing college coursework for an associate degree, playing organized team sports, part-time
13 employment as a manager, and “deal[ing] with supervisors, coaches and teachers.” AR 1377.

14 Plaintiff argues that college coursework does not contradict Dr. Bowes’ opinions because
15 he could only take one course at a time and passed his classes “by D- grade.” AR 797; Dkt. 12 at
16 7. Yet Plaintiff reported that he graduated from community college in 2009 and “did great” in
17 school. AR 1010-11, 606, 705. It is the ALJ’s responsibility to resolve conflicting evidence.
18 *Andrews*, 53 F.3d at 1039. The ALJ’s finding that Plaintiff’s mental impairments did not prevent
19 him from successfully completing a degree was a rational interpretation of the record and
20 supported by substantial evidence. The ALJ’s conclusion that this accomplishment contradicted
21 Dr. Bowes’ opinion that Plaintiff had marked difficulty in, for example, maintaining appropriate
22 behavior or communicating effectively was a specific and legitimate reason to discount Dr.
23 Bowes’ opinions.

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1 Plaintiff also asserts that he had “limited participation” in team sports and “there is no
2 evidence” he dealt with coaches or “how well” he dealt with teachers. Dkt. 14 at 3. Plaintiff
3 reported playing on sports teams, which was substantial evidence supporting the ALJ’s findings.
4 AR 708. The ALJ reasonably inferred that Plaintiff dealt with coaches as a member of a team,
5 and that Plaintiff dealt with teachers well enough to complete a degree. *See Batson v. Comm’r,*
6 *Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004) (“[T]he Commissioner’s findings are
7 upheld if supported by inferences reasonably drawn from the record.”).

8 Plaintiff does not challenge the ALJ’s finding that his work as a manager undermined Dr.
9 Bowes’ opined marked limitations.

10 Plaintiff’s activities were a specific and legitimate reason to discount Dr. Bowes’
11 opinions.

12 **b. Clinical Findings**

13 Incongruity between a treating physician’s opinions and her own medical records is a
14 “specific and legitimate reason for rejecting” the opinions. *Tommasetti v. Astrue*, 533 F.3d 1035,
15 1041 (9th Cir. 2008). The ALJ cited examples of cooperative behavior and normal cognitive
16 results. AR 1377. Plaintiff cites Dr. Bowes’ observations from the 2010 examination such as
17 psychomotor agitation, concentration difficulties, irritability, and angry outbursts. Dkt. 14 at 3-4.
18 But in 2010 Dr. Bowes opined only mild to moderate limitations. Similar observations in the
19 2011 examination could not be the basis for the more severe marked limitations. Plaintiff has
20 shown no error.

21 Lack of clinical abnormalities, in addition to conflict with Plaintiff’s activities, were
22 specific and legitimate reasons to discount Dr. Bowes’ opinions. The Court concludes the ALJ
23 did not err by discounting the opinions.

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1 **2. Other Medical Evidence**

2 Plaintiff's opening brief includes five pages describing portions of the medical record,
3 concluding with the bare assertion that this evidence "support[s] his testimony." Dkt. 12 at 8-13.
4 This assertion does not meet Plaintiff's burden to demonstrate error, it does not constitute an
5 argument, and the Court will not consider it further. *See Carmickle*, 533 F.3d at 1161 n.2 (noting
6 that the court "'ordinarily will not consider matters on appeal that are not specifically and
7 distinctly argued in an appellant's opening brief'" (quoting *Paladin Assocs., Inc. v. Mont. Power*
8 *Co.*, 328 F.3d 1145, 1164 (9th Cir. 2008)); *see also Molina*, 674 F.3d at 1111 (the burden of
9 showing harmful error falls on the party attacking an agency's determination) (citing *Shinseki*,
10 556 U.S. at 409).

11 **C. Lay Witness**

12 An ALJ may discount lay witness testimony by giving a germane reason. *Diedrich v.*
13 *Berryhill*, 874 F.3d 634, 640 (9th Cir. 2017). In 2009, Plaintiff's partner filled out a Function
14 Report describing limitations similar to Plaintiff's testimony. AR 240. The ALJ discounted her
15 statements as inconsistent with objective medical evidence and Plaintiff's activities, such as
16 attending college and working part-time. AR 1379. Just as those reasons were sufficient to
17 discount Plaintiff's testimony, they were sufficient to discount his partner's lay witness
18 statement. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (inconsistency with
19 medical evidence and activities of daily living are germane reasons for discrediting lay witness
20 testimony); *Valentine*, 574 F.3d at 694 (holding that if an ALJ gave clear and convincing reasons
21 for rejecting the claimant's testimony, those reasons are germane to similar testimony by a lay
22 witness).

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DATED this 25th day of September, 2019.

Richard A. Jones

The Honorable Richard A. Jones
United States District Judge